IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.252 OF 1989

The State of Maharashtra ...Appellant

vs.

Suresh Yadavrao Pawar ...Respondent

Ms Kejriwal, A.P.P. for State
Ms Bharati Mahant for Shri B.G.Vaidya for the Respondent.

CORAM: SMT.RANJANA DESAI &
A.S.OKA,JJ.
DATE : DECEMBER 1, 2004.

ORAL JUDGMENT : **(Per Abhay S. Oka,J.)**

1. By this appeal against acquittal, the State of Maharashtra has taken exception to the Judgment and Order dated 30th November 1988 passed by the learned Additional Sessions Judge, Satara in Sessions Case No.38 of 1988.

2. The Appellant-State Government prosecuted the Respondent for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act of 1985). The case of the Appellant is that information was received by P.S.I. Ramesh Bhurewar (P.W.No.3) attached to Satara Police Station that the Respondent was selling manufactured drug viz.Heroin powder in contravention of the provisions of said Act of 1985. Therefore, the said Police Officer directed P.W.No.2-Ramchandra Genba Raskar-Police Constable to bring two

panchas. Accordingly, two panchas were brought before P.W.No.3 Bhurewar. He explained the purpose of raid to the panchas. P.W.No.3-Bhurewar obtained written permission of his superior Officer to carry out the proposed raid. When the raiding party reached near Bhairoba temple, the accused was found at the corner of the road. As soon as he saw the police jeep in which the raiding party was sitting, he tried to run away. However, the Police Constable Raskar and another Constable Pawar followed the accused and they apprehended the accused. P.W.No.3 Bhurewar came there and he explained the purpose of raid to the accused. When personal search of the accused was taken, a packet containing small seven packets was found in the right hand side pocket of his trouser. The packets were removed in presence of the panchas. It is the case of the prosecution that the packets contained manufactured drug viz. Heroine powder. The raiding party was carrying weighing machine. Accordingly, the packets were weighed in presence of the panchas. The total weight was found to be 650 mg. The said small packets were then put in a white packet which was sealed. The paper seals were signed by the panchas and P.S.I. Bhurewar also signed thereon. A lac seal of the police station was also put on the white packet.

3. The accused and the contraband articles were brought to the police station and accused was arrested. P.W.No.4 Police Constable Kukade carried the sealed parcel to the Chemical Analyser's office at Pune. The report of the Chemical

Analyser shows that Heroine was detected in randomly selected exhibit (sample) Nos.1,3 and 7.

4. The prosecution examined three witnesses. P.W.No.1 Rajaram Kirdat is one of the panch witnesses. P.W.No.2 R.G. Raskar is the Police Constable attached to Satara Police Station. He called the panch witnesses and he was a member of the police party which conducted the raid. P.W.No.3 Ramesh Bhurewar,P.S.I. is the Investigating Officer. The learned Sessions Judge after scrutinising the evidence of the witnesses came to the conclusion that the prosecution has proved that the accused was in possession of the contraband articles viz.Heroine on 31st August 1987. The learned Sessions Judge however held that P.W.No.3 Bhurewar was not a Police Officer who was authorised to initiate action under the said Act of 1985. On this ground, the learned Sessions Judge held that the prosecution was vitiated and therefore, he proceeded to acquit the accused.

5. The learned A.P.P. Ms Kejriwal submitted that the finding recorded by the Additional Sessions Judge that P.S.I.Bhurewar was not competent to initiate an action under the provisions of the said Act of 1985 and that he was not competent to arrest the accused are not correct. She submitted that by a general order issued by the State Government the P.S.I. Bhurewar was competent to take search and arrest the accused. She submitted that on merits the learned Additional Sessions

Judge has accepted the evidence of the prosecution and has held that the accused was in possession of contraband viz. Heroine powder on 31st August 1987 at about 1.00 p.m. near Bhiroba temple, Karanja, Dist.Satara. She submitted that the accused was acquitted only on technical ground of lack of authorisation in favour of P.S.I. Bhurewar. She submitted that the finding recorded by the Additional Sessions Judge about lack of authority in favour of P.S.I. Bhurewar is required to be set aside. She lastly submitted that the acquittal of the accused was required to be overturned and the accused deserves to be convicted. She has taken us through notes of evidence and relevant documents on record.

6. The learned Counsel for the Respondent submitted that the prosecution did not produce any evidence in the form of notification or order issued by the State Government which shows that P.S.I.Bhurewar was authorised to take action under Sections 42 and 43 of the said Act of 1985. She submitted that there was nothing on record to show that accused was informed about his right under Section 50 of the said Act of 1985 before he was searched. She submitted that even assuming that P.S.I. Bhurewar was authorised by a special or general order of State Government to take action under Sections 42 and 43 of the said Act of 1985, the learned Additional Sessions Judge has overlooked the fact that there was no compliance with the mandatory requirement of Section 50 of the said Act of 1985. She submitted that as there was no compliance with

the mandatory requirement of Section 50 of the said Act of 1985, acquittal of the accused was required to be confirmed.

7. We have carefully considered the rival submissions. We have also perused the notes of evidence. P.W.1 Rajaram Tukaram Kirdat is the Panch witness in whose presence search of the person of the accused was taken and alleged contraband article viz.Heroine Powder was seized. The Panchnama dated 31st August 1987 recording search has been duly proved by the said witness. P.W.No.2 Ramchandra Genba Raskar is a Police Constable who deposed before the Trial Court setting out the manner in which raid was conducted. P.W.3, Investigating Officer Ramesh Bhurewar, P.S.I. has also deposed about the search of the person of the accused and seizure of the contraband articles. After having perused the notes of evidence and the finding recorded by the learned Additional Sessions Judge, we are unable to find any fault with the finding recorded by the Additional Sessions Judge that the prosecution has proved that accused was in possession of Heroine Powder on 31st August 1987.

8. However, perusal of the depositions of all the three witnesses show that there is no compliance with the mandatory requirement of Section 50 of the said Act of 1985. None of the witnesses have deposed before the learned Additional Sessions Judge that before search of the accused was made, the accused was informed about his right under Section 50 of the

said Act of 1985. The Apex Court in a Judgment reported in **(1994) 3 Supreme Court Cases page No.299 (State of Punjab Vs. Balbir Singh)** has held in paragraph No.16 that

> "... To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be search, he must be aware of his right and that can be done only by the authorised officer informing him. **The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.**"
>
> (emphasis supplied)

In the same decision the Apex Court further proceeded to hold in paragraph No.20 that,

> "... When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is

all the more important and valuable. **Therefore, it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.**"

(emphasis supplied)

9. In the present case no material is placed on record by the prosecution to show that there was compliance with the mandatory requirement of Section 50 of the said Act of 1985. Therefore, entire prosecution stands vitiated. In view of this position it is not necessary for us to deal with the submissions made by the learned A.P.P. that P.S.I. Bhurewar was an authorised officer. If there is total non-compliance with mandatory requirement of Section 50 of the said Act of 1985, the accused cannot be convicted.

10. In this view of the matter no fault can be found with the order of acquittal passed by the learned Additional Sessions Judge. Hence, Appeal is dismissed.

(SMT.RANJANA DESAI,J.)

(ABHAY S. OKA,J.)